Taking an illustration – if the amount of the charge is, say, $20,000 and the chargee engaged a Queen's Counsel from London paying $100,000 as fees, it would be preposterous to include the expenses to be deducted from the proceeds of sale and given to the chargee. This is costs incurred between client and solicitor.

Any way, there are sufficient funds available and there is nothing to stop the plaintiff from proving its claim in bankruptcy, if at all it is provable and payable legally.

The summons-in-chambers is dismissed. The balance of the proceeds shall now be transmitted to the Official Assignee.

*Order accordingly.*

Solicitors: *Bernatt Pereira & Co.*

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## MELVIN LEE CAMPBELL v. AMY ANAK EDWARD SUMEK

**[O.C.J. (Tan Chiaw Thong J.) 12 March 1988]**

**[Kuching – Divorce Petition No. KG 19 of 1987]**

*Family Law – Divorce – Joint petition – Domicile of husband – Domicile of choice – Whether domicile of choice is Malaysia – Whether court has jurisdiction to entertain petition – Law Reform (Marriage and Divorce) Act 1976, s. 48.*

In this case, a joint petition for divorce was made. According to section 48(1) of the Law Reform (Marriage and Divorce) Act 1976, a court can grant a decree of divorce only if both parties were domiciled in Malaysia. The issue before the present court was whether the husband petitioner was domiciled in Malaysia at the time of presentation of the petition.

**Held:** (1) there are two essential elements involved in determining the domicile of choice and these are the factors of residence and the requisite intention to reside permanently for an indeterminate period in the country where it is alleged that the petitioner has adopted the domicile of choice;

(2) the provision of section 48(1)(c) requires that the court must be satisfied that at the time when the petition was presented the domicile of both the petitioners was in Malaysia;

(3) taking into consideration all factors both in favour and against the husband petitioner in the light of all relevant circumstances, and giving due consideration to his assertion that he intended to make Malaysia his permanent home and also bearing in mind that the burden of proving the abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia falls squarely on the husband petitioner, the husband petitioner had not succeeded in showing that at the time of the presentation of the joint petition his domicile was in Malaysia;

(4) therefore, the court has no jurisdiction to entertain the joint petition.

*Case referred to:*

(1) *Winans & Anor.* v. *Attorney-General* [1904] A.C. 287 (cited).

DIVORCE PETITION.

*Richard Poh* for the petitioners.

*Abdul Razak bin Hj. Mohd. Tready* (Acting Deputy State Attorney-General) as *amicus curiae.*

*Cur. Adv. Vult.*

**Tan Thiaw Chong J.**: The matter which calls for determination by this court at this hearing relates to the domicile of the husband petitioner at the time when the joint petition for divorce by mutual consent was presented under section 52 of the Law Reform (Marriage and Divorce) Act 1976.

Section 48(1) of the 1976 Act provides, *inter alia,* that nothing in that Act shall authorize the court to make any decree of divorce except "(c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia". There is no question about the wife petitioner at the material time being domiciled in Malaysia. The provision of section 48(1)(c) in my view requires that the court must be satisfied that at the time when the petition in the instant case was presented, the domicile of both the petitioners was in Malaysia. It is true that in the instant petition itself, the husband petitioner asserts that at the time of the presentation of the petition he was domiciled in Malaysia, and this is supported and reiterated in his affidavit sworn on 13 July 1987. In this instance, I would observe that the evidence of the husband petitioner states that he was, and is, an agnostic, but his affidavit was sworn and not affirmed. However that may be, this is of no consequence, in my view, as regards the domicile of the husband petitioner. I do not take this factor in any way as operating against the husband petitioner.

As rightly pointed out by learned counsel who appeared for the State Attorney-General as *amicus curiae* – and this is not a matter at issue – the onus of proving that the husband petitioner at

the material time had abandoned his domicile of origin in favour of a domicile of choice in Malaysia rests squarely on the husband petitioner.

There are two essential elements involved in determining the domicile of choice, and these are the factors of residence and the requisite intention to reside permanently for an indeterminate period in the country where it is alleged that the petitioner has adopted the domicile of choice. In this instance, it is to be noted that paragraph 434 of *Halsbury's Laws of England* (4th Ed.) states as follows:

"434. *Direct and secondary evidence of intention.* Direct evidence of intention is often not available, but a person whose domicile is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness.

Expressions of intention, written or oral, may be given in evidence, but such evidence must be carefully weighed in connection with the circumstances in which it occurred, and even if the expressions are clear and consistent they cannot prevail against a course of conduct leading to an opposite inference."

And in the next paragraph, under the heading "Residence as Evidence", the following passage occurs:

"Residence in a country, especially if it is continued for a long period, is evidence of an intention to remain there; in the absence of other evidence, residence alone may support the inference that a domicile has been acquired. Such cases will be rare, and, while residence is always material evidence, it is seldom decisive, for slight circumstances may serve to show the absence of a settled intention."

The next paragraph in my view is also relevant, and it states:

"436. *Residence as a matter of duty.* A person may reside in a country as a result of his being under some duty, public or private. Examples include diplomats and other overseas servants of the Crown, members of the armed forces, employees of international organizations or of commercial undertakings with interests in several countries, and domestic servants attached to such persons. Such residence is likely to be temporary and may be in some measure involuntary. If it is not accompanied by any intention to make a permanent home in the country of residence, the propositus will retain his former domicile.

Such a person may be held to have acquired a domicile of choice in the country of residence if the appropriate intention can be derived from all the circumstances. Cogent evidence of such intention is required. The fact that the public office is in the service of the country of residence, an alien country, is material."

In this connection, the husband petitioner has stated in effect that his stay in Indonesia was necessitated by the nature of his employment there and is no indication that he has decided to reside in that country.

As stated, it is not in issue that the onus of proving that the husband petitioner has abandoned his domicile of origin in favour of a domicile of choice in Malaysia rests on him. In this connection, the onus is a heavy one, as indicated in the case of *Winans & Anor.* v. *Attorney General*[1] in the judgment of Lord Macnaghten in that case. The following passage appears at p. 291 of the judgment:

"So heavy is the burden cast upon those who seek to shew that the domicile of origin has been superseded by a domicile of choice! And rightly, I think. A change of domicile is a serious matter – serious enough when the competition is between two domiciles both within the ambit of one and the same kingdom or country – more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicile."

Further, proof of change of domicile having the effect of abandoning a domicile of origin in favour of a domicile of choice must be proved with perfect clearness and satisfaction (see the same judgment at p. 292).

The question I have to decide, therefore, is whether, on the evidence given by the husband petitioner, taken in the light of his assertions in the joint petition and his supporting affidavit, the court is satisfied that the evidence has shown with perfect clearness and satisfaction in this court that the husband petitioner had abandoned his domicile of origin and acquired a domicile of choice at the time of the presentation of the petition.

Learned counsel for the husband petitioner has emphasized and elaborated on the factors which the court should consider as factors indicating that the husband petitioner had abandoned his domicile of origin and acquired a domicile of choice in Malaysia at the relevant time. He has stressed that the husband petitioner had married a native of this state; that he had set up the matrimonial home of his family here; that he had resided here for a long period; that he had arranged for the issue of the marriage to reside and be educated here; that he had expressed his intention to be converted to the religion of Islam and had taken steps to have that intention materialized; and also that he had taken

steps to explore the possibility of investing in Malaysia. On this last factor, I would observe that on his own evidence, whatever steps the husband petitioner has taken in relation to setting up business on joint venture or otherwise in Malaysia so far are only exploratory. Except for two periods which he mentioned – from March to December 1979 when he went back to the U.S.A. with his wife, and from January 1981 when they stayed for two years in Singapore – he has resided in this state since June 1977 when he arrived in Malaysia. He is now employed as a line pilot with P.T. Airfast, a helicopter firm in Indonesia, and before that, he was managing pilot of that firm. The husband petitioner at the time of his stay in Sarawak was employed as a helicopter pilot for Wira Kris Schriner in Kuching until his employment subsequently in P.T.Airfast, Indonesia. Other factors urged in his favour are that, during his stay in Sarawak, he has contributed quite a large sum of money to the extent of around $20,000 towards the purchase of a house for his parents-in-law at Kampung Kakai in Serian, and the wife petitioner is still residing there with the child of the marriage. However, on the other hand, the husband petitioner has stated that for himself, he has not bought any property nor made any actual investment in Malaysia even up to today, and as indicated earlier, the last thing he has done was to take steps of an exploratory nature towards the possibility of setting up business on joint venture or otherwise in Malaysia. He has stated in evidence that when he first arrived here, he had the feeling that this was the place where he would make his home, but as indicated above, any pronouncement as to the intention of the husband petitioner should be considered with care and caution having regard to the fact that this pronouncement was made in the light of the presentation of the instant petition; it must be weighed with other relevant factors.

The relevant time to decide whether the husband petitioner has acquired a domicile of choice and abandoned his domicile of origin is at the time of the presentation of the petition. At that time, the matrimonial relationship between both petitioners had broken down. The husband petitioner has stated that there had been a lack of communication between him and the wife petitioner. At that time, apart from his own pronouncement that he intended to make Malaysia his home permanently, the only other indication of this is his contribution, as stated, towards the purchase of the house of his parents-in-law and his contribution towards a small business of a foodstall run by his wife. At that time, he had no permanent residence in Malaysia.

Taking into consideration all factors both in favour and against the husband petitioner in the light of all the relevant circumstances, and giving due consideration to his assertion that he intended to make Malaysia his permanent home, and also bearing in mind that the burden of proving the abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia falls squarely on the husband petitioner, I have, with regret, come to the conclusion that the husband petitioner has not succeeded in showing to my satisfaction that at the time of the presentation of the joint petition his domicile was in Malaysia. Accordingly, I rule that in relation to the instant joint peition, the court has no jurisdiction to entertain it.

*Order accordingly.*

Solicitors: *Poh & Co.*